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No. 04-1324

In The
Supreme Court of the United States
October Term, 2005

PATRICK A. DAY,
Petitioner,

v.

JAMES V. CROSBY, JR., Secretary,
Florida Department of Corrections,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

(COMBINED AND RESTATED)

Whether a district court has discretion to dismiss a habeas petition as untimely despite a State's waiver, inadvertent or otherwise, if the district court gives the parties notice and an opportunity to be heard and considers whether a *sua sponte* dismissal would prejudice the petitioner?

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STATEMENT OF THE CASE

A Florida jury convicted Day of second degree murder, and he was sentenced by a Florida trial court. The Florida First District Court of Appeal ("First District") affirmed Day's sentence on December 21, 1999. (J.A. 1, 3). Day did not petition this Court for review of that decision, but his deadline for doing so was March 20, 2000. *See* Supreme Court Rule 13.1.

Three hundred and fifty-three (353) days later, on March 13, 2001, Day filed a motion for state post-conviction relief. (J.A. 2). That motion and a second post-conviction motion were both denied. (J.A. 2). The First District affirmed and issued its mandate on December 3, 2002. (J.A. 4).

Thirty-six (36) days later, on January 8, 2003, Day filed the petition for federal habeas relief that is the subject of this appeal. (J.A. 5). The assigned magistrate judge ordered the State to answer. (J.A. 21). Respondent's answer erroneously concluded that the petition had been "filed after 352 days of untolled time" and was therefore "timely," even though the answer and its attachments revealed that more than one year of untolled time had passed between the finality of Day's conviction and the filing of his habeas petition. (J.A. 23-24; Dkt. 7, Exs. G, I, P (Exhibits to Respondent's Answer)). Upon order of the court, Day filed a reply to Respondent's answer. (Dkts. 8, 9).

No further activity occurred in the case until December 2003, when a newly assigned magistrate judge ordered Day to show cause why the petition should not be dismissed as untimely. (J.A. 26-30). Day's response noted Respondent agreed the petition was timely, and contended his petition was in fact timely because the limitations period in 28 U.S.C. § 2244(d) was tolled during the time when he could have sought certiorari from the First District's denial of post-conviction relief. (J.A. 31-32). He also raised brief arguments relating to equitable tolling. (J.A.

32). The magistrate judge recommended dismissal, concluding Day's argument that his petition was timely was foreclosed by controlling Eleventh Circuit precedent and his equitable tolling claim was deficient. (Petition for Cert. App. C at 8a-15a). Day filed an objection, asserting that the district court's power to dismiss a plainly deficient habeas petition expired when the court ordered the respondent to file an answer. (J.A. 35). The district court adopted the magistrate judge's report and recommendation and dismissed the petition. (J.A. 7).

The Eleventh Circuit granted Day a certificate of appealability to address "[w]hether the district court erred in addressing the timeliness of appellant's habeas corpus petition . . . after Respondent had conceded that [Day's] petition was timely." (J.A. 37). The court affirmed, holding that "a concession of timeliness that is patently erroneous does not compromise the authority of a district court to dismiss *sua sponte* a habeas petition that is untimely, under AEDPA, which was enacted to promote finality of state criminal judgments." *Day v. Crosby*, 391 F.3d 1192, 1192 (11th Cir. 2004). This Court granted certiorari. *Day v. Crosby*, 126 S. Ct. 34 (2005).

SUMMARY OF ARGUMENT

A district court has authority to raise the AEDPA limitations defense *sua sponte* nothwithstanding a State's waiver, and to dismiss an untimely petition after having given notice and determined that the petitioner is not prejudiced by the *sua sponte* dismissal. While Respondent acknowledges the limitations defense may be waived, that waiver, inadvertent or otherwise, is not alone dispositive of the court's inherent authority. Rather, the district court must exercise discretion in each case to decide whether the administration of justice is better served by dismissing the case on limitations grounds or by reaching the merits of the petition.

Habeas cases differ from ordinary civil cases because habeas cases implicate interests of comity, federalism, and finality --- interests beyond those of the parties. Recognizing this distinction, this Court and the lower courts have held that federal habeas courts have inherent authority to raise other potential non-jurisdictional bars to habeas relief even where the government has not properly raised such defenses. AEDPA's limitations defense implicates these same interests and promotes judicial efficiency and conservation of judicial resources. Therefore, federal courts may raise the limitations defense *sua sponte* just as they may raise the more traditional habeas defenses *sua sponte*. The exercise of inherent authority to dismiss untimely petitions is consistent with both the letter and spirit of the Habeas Rules and with this Court's habeas jurisprudence.

Waiver of the limitations defense is a factor to be considered by the court in determining whether to raise the defense *sua sponte*. Indeed the intentional relinquishment of the defense would weigh against *sua sponte* dismissal. However in this case, the district court was correct to raise the limitations defense *sua sponte* because applicability of the defense was apparent from the entirety of Respondent's answer.

Day was given appropriate notice and the opportunity to be heard before his untimely petition was dismissed, and is not prejudiced by the dismissal. A frustrated expectation of receiving a decision on the merits does not constitute prejudice. Further, there is no suggestion Respondent "strategically" withheld the defense, and the possibility that a State might do so in another case is not a sound basis for denying courts the authority to consider timeliness *sua sponte* in all cases. Additionally, the fact that statute of limitations calculations in habeas cases are prone to error counsels in favor of district court discretion. The effectuation of AEDPA's purposes should not depend solely on the ability of one government attorney to calculate the limitations period correctly in a given case.

Finally, Day's contention his petition was timely is not fairly included within the certiorari petition and in fact would obviate the need to address the issues upon which the Court granted certiorari. Additionally, Day's contention his petition was timely can only be correct if his state postconviction motion remains "pending" under 28 U.S.C. § 2244(d)(2) during the period when he could have, but did not, petition this Court for a writ of certiorari. This construction of § 2244(d)(2) is inconsistent with this Court's decision in *Carey v. Saffold*, 536 U.S. 214 (2002), and has been rejected by all but one of the eleven circuits to have considered the issue. Thus even if the Court reaches this issue, it should reject Day's argument and approve the view of the overwhelming majority of the circuits.

ARGUMENT

I. A DISTRICT COURT HAS DISCRETION TO RAISE THE LIMITATIONS DEFENSE *SUA SPONTE*

Respondent of course acknowledges the statute of limitations defense in a habeas proceeding may be waived. Every circuit court of appeal to consider the issue has held the limitations defense is not jurisdictional and is thus subject to equitable considerations such as waiver. *E.g.*, *Robinson v. Johnson*, 313 F.3d 128, 134, 141 (3d Cir. 2002), *cert. denied*, 540 U.S. 826 (2003); *Acosta v. Artuz*, 221 F.3d 117, 122 (2d Cir. 2000). However, the effect of a State's waiver in any given case presents a question subsumed by the central issue presented in this case—whether a federal court has discretion to dismiss an untimely habeas petition notwithstanding the State's waiver of the statute of limitations defense. As developed below, a State's waiver of the limitations defense in a § 2254 case, inadvertent or otherwise, is not alone dispositive. Waiver is simply one factor for the district court to consider in deciding whether to exercise its *sua sponte* discretion to raise the limitations defense and, after notice and absent prejudice, ultimately to dismiss on that basis.

A. Habeas proceedings implicate interests beyond those of the parties.

The exercise of habeas jurisdiction exacts "profound societal costs." *Smith v. Murray*, 477 U.S. 527, 539 (1986), *quoted in Calderon v. Thompson*, 523 U.S. 538, 554 (1998). Among the heaviest costs of habeas review is the frustration of "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982), *quoted in, e.g.*, *Calderon*, 523 U.S. at 555-56, *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993), and *McCleskey v. Zant*, 499 U.S. 46, 491 (1991). This Court has recognized repeatedly the States' significant interest in the

finality of convictions that have survived direct review within the state courts. *Brecht*, 507 U.S. at 635; *Bell v. Thompson*, 125 S. Ct. 2825, 2837 (2005); *Calderon*, 523 U.S. at 555. "Finality is essential to both the retributive and deterrent functions of the criminal law." *E.g.*, *Calderon*, 523 U.S. at 555. "Neither innocence nor just punishment can be vindicated until the final judgment is known," *McCleskey*, 499 U.S. at 491, and "[w]ithout finality, the criminal law is deprived of much of its deterrent effect," *id.* (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989)).

Lack of finality has heightened significance in the context of habeas petitions filed under 28 U.S.C. § 2254 because such petitions implicate comity and federalism concerns. *See McCleskey*, 499 U.S. at 491; *Engle*, 456 U.S. at 134. "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." *McClesky*, 499 U.S. at 491, *quoted in Calderon*, 523 U.S. at 556. The Court has recognized that liberal allowance of habeas diminishes the significance of state trial court proceedings, *see, e.g.*, *id.* at 635, *Engle*, 456 U.S. at 127, encourages petitioners to relitigate claims on collateral review, *Brecht*, 507 U.S. at 635, and even arguably erodes the quality of state court judging and the morale of state judiciaries, *see Calderon*, 523 U.S. at 555 ("There is perhaps nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.") (internal quotation omitted); *Engle*, 456 U.S. at 128 n.33. Thus, "[i]ndiscriminate federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own." *Id.*

Congress sought to promote the core interests of comity, federalism, and finality by enacting The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See, e.g.*,

Woodford v. Garceau, 538 U.S. 202, 206 (2003) (recognizing that Congress enacted AEDPA to reduce delays in the execution of criminal sentences and "to further the principles of comity, finality, and federalism") (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)); *see also Mayle v. Felix*, 125 S. Ct. 2562, 2573 (2005) ("Congress enacted AEDPA to advance the finality of criminal convictions."). Even in cases where the specific terms of AEDPA do not address the precise question at issue, federal courts must act consistently with the specific objects of AEDPA and the general principles underlying this Court's habeas jurisprudence. *Calderon*, 523 U.S. at 554 ("Although the terms of AEDPA do not govern this case, a court of appeals must exercise its discretion [to *sua sponte* recall its mandate] in a manner consistent with the objects of the statute."). Therefore, any exercise of discretion in a § 2254 case must be carried out with these objects in mind.

Day discounts the fundamental distinction between habeas and ordinary civil cases arguing that the interests of comity, federalism, and finality have no impact on the outcome of this case. After all, Day asserts, "Congress did not enact 'comity, federalism, and finality;' it enacted AEDPA." (Pet. Brief 31). But Day's position ignores this Court's consistent instruction that courts must exercise their discretion in determining whether granting the writ in a particular case is consistent with the overarching habeas principles of comity, federalism, and finality. This discretion is embodied in the courts' long recognized authority to raise *sua sponte* defenses to habeas relief including exhaustion, procedural default, nonretroactivity, and abuse of the writ—even when the State has failed to raise such defenses—because of the societal costs that attend the federal courts' exercise of habeas jurisdiction. Like these traditional habeas defenses, AEDPA's statute of limitations defense implicates concerns beyond those of the individual litigants in a particular proceeding. Each of these defenses exists to safeguard the finality of judgments and respect for state sovereignty.

Therefore, it is a proper exercise of judicial discretion for a federal court to raise habeas defenses *sua sponte* when doing so is consistent with these principles.

B. Courts have discretion to raise procedural bars to habeas relief *sua sponte*.

A State's answer to a habeas petition must state whether any claim in the petition is barred by "a failure to exhaust remedies, a procedural bar, non-retroactivity, or a statute of limitations." Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts (2005).[1] None of these bars is jurisdictional. *E.g.*, *Granberry v. Greer*, 481 U.S. 129, 131 (1987) (exhaustion not jurisdictional); *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (procedural default bar not jurisdictional); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (nonretroactivity principle not jurisdictional); *Robinson*, 313 F.3d at 134 (limitations not jurisdictional). Nevertheless, this Court and the circuit courts have held repeatedly that even when one of these potential bars is not properly raised by the State, the federal courts have discretion to raise the issue. *Long v. Wilson*, 393 F.3d 390, 403 (3d Cir. 2004) ("It is now widely recognized that judges have discretion to raise procedural defenses in habeas cases."). This is because the interests advanced by these defenses, comity, federalism, and finality, are institutional interests that extend beyond the interests of the litigants in any particular case.[2]

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[1] Respondent cites the current version of the rule even though it contains amendments made after pleading was complete in the present case because the amendments were intended to be stylistic only and not substantive. *See* Rule 5, Rules Governing Section 2254 Cases, Notes of Advisory Committee on 2004 amendments.

[2] Day relies heavily on *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002) and *Nardi v. Stewart*, 354 F.3d 1134 (9th Cir. 2004). However, neither case even mentions *Granberry v. Greer*, 481 U.S. 129 (1987),

1. Failure to Exhaust

Absent exceptional circumstances, a federal court will not consider a habeas petition until the petitioner has exhausted his state remedies. 28 U.S.C. § 2254(b)(3); *e.g.*, *United States, ex rel Kennedy v. Tyler*, 269 U.S. 13, 17-19 (1925). This doctrine is based on comity: "federal courts . . . will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstances of peculiar urgency are shown to exist." *Ex parte Hawk*, 321 U.S. 114, 117 (1944).

This Court has held that when a State fails to raise an arguably meritorious nonexhaustion defense, it is appropriate for a habeas court to take a "fresh look" at the issue. *Granberry v. Greer*, 481 U.S. 129, 131 (1987).[3] In reaching this conclusion, the Court recognized that although the State has a duty under Habeas Rule 5 to advise the district court whether the prisoner has exhausted all available state remedies, there are exceptional cases in which the State fails to do so. *Id.* The Court acknowledged three possible consequences of the State's failure to raise a potentially viable exhaustion defense: the Court could (1) prohibit dismissal on exhaustion grounds; (2) require dismissal on exhaustion grounds notwithstanding the State's failure to raise the issue; or (3) adopt an intermediate approach

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discussed *infra*, and its progeny, nor any of the procedural default or nonretroactivity cases. Moreover, neither case recognizes the fundamental distinctions between habeas and ordinary civil cases nor AEDPA's avowed congressional purpose of advancing comity, federalism and finality.

[3] As part of AEDPA, § 2254 was amended to provide that a State shall not be deemed to have waived the exhaustion requirement unless the State waives the requirement expressly. 28 U.S.C. § 2254(b)(3). This provision was added in reaction to court decisions that deemed States to have waived the exhaustion requirement where the State did not do so expressly. H.R. Rep. No. 104-23, at 10 (1995). Although *Granberry* predates AEDPA, the force of its reasoning nevertheless applies.

allowing the courts to exercise discretion to determine what resolution best serves the administration of justice in each case. *Id.* at 131. The Court rejected the two "extreme positions," holding that a court "is not required to dismiss for nonexhaustion notwithstanding the State's failure to raise it, and the court is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 133. The Court instead adopted the "middle course," allowing the federal court to determine in each case whether the interests of comity, federalism, and judicial efficiency will be better served by addressing the merits or by requiring additional proceedings in state court. *Id.* at 134, 135.

Thus, even where a State has failed to raise the defense of nonexhaustion, federal courts routinely consider *sua sponte* whether such defense should be applied in a given case in the interests of comity, federalism, and judicial economy. *E.g.*, *Graham v. Johnson*, 94 F.3d 958, 970-71 (5th Cir. 1996); *Smith v. Horn*, 120 F.3d 400, 407-08 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998).

2. Procedural Default

As a corollary to the exhaustion requirement, a habeas petition may be barred for procedural default if the petitioner failed to raise an alleged constitutional error in state court and is barred from doing so by state procedural rules. *Wainwright v. Sykes*, 433 U.S. 72, 81-87 (1977). Like exhaustion, this rule is grounded in respect for finality, comity, and the orderly administration of justice. *Dretke v. Haley*, 541 U.S. 386, 388 (2004). It is based upon the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds. *Id.* at 392-93; *Engle*, 456 U.S. at 128-29.

This Court has not squarely addressed the question of whether a court may raise a procedural default defense *sua*

sponte. In *Trest v. Cain*, 522 U.S. 87 (1997), the Court held a court of appeals is not *required* to raise the issue of procedural default *sua sponte* when it has been waived or not raised by the State. *Id.* at 89. The Court expressly declined to address the narrower issue of whether the law *permitted* the circuit court to raise the procedural default issue *sua sponte*, because that issue was not within the scope of the question presented. *Id.*

The circuit courts hold unanimously that *sua sponte* consideration of procedural default is within the court's discretion. *See, e.g., Oakes v. United States*, 400 F.3d 92, 96 (1st Cir. 2005); *Washington v. James*, 996 F.2d 1442, 1448 (2d Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994); *Sweger v. Chesney*, 294 F.3d 506, 520-21 (3d Cir. 2002), *cert. denied*, 538 U.S. 1002 (2003); *Yeatts v. Angelone*, 166 F.3d 255, 261-62 (4th Cir.), *cert. denied*, 526 U.S. 1095 (1999); *Magouirk v. Phillips*, 144 F.3d 348, 358 (5th Cir. 1998); *Sowell v. Bradshaw*, 372 F.3d 821, 830 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 1645 (2005); *Washington v. Lane*, 840 F.2d 443, 446 (7th Cir.), *cert. denied*, 488 U.S. 861 (1988); *King v. Kemna*, 266 F.3d 816, 821 (8th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 934 (2002); *Vang v. Nevada*, 329 F.3d 1069, 1073 (9th Cir. 2003); *Hardiman v. Reynolds*, 971 F.2d 500, 503 (10th Cir. 1992); *Esslinger v. Davis*, 44 F.3d 1515, 1523-29 (11th Cir. 1995). The universal view is that although affirmative defenses ordinarily must be raised by a defendant, the defense of procedural default in habeas proceedings implicates values that transcend the concerns of the parties, i.e., comity, finality, and respect for state judgments. *E.g., Sweger*, 294 F.3d at 520 n.13; *Hardiman*, 971 F.2d at 503. Therefore, it is not exclusively within the parties' control to decide whether such a defense should be raised or waived. *E.g., Sweger*, 294 F.3d at 520 n.13; *see also Oakes*, 400 F.3d at 97 (where "institutional values that transcend the litigants' parochial interests . . . are in play, . . . the court should have some say in deciding whether a defense should be considered or deemed waived").

3. *Nonretroactivity*

A third potential bar to habeas relief, nonretroactivity, prohibits a federal court from granting relief to a state prisoner based on a new constitutional rule of criminal procedure announced after the prisoner's conviction and sentence become final. *Teague v. Lane*, 489 U.S. 288, 310 (1989). This prohibition derives from concerns for finality and evenhanded justice. *Id.* at 300, 309. This Court determined that applying constitutional rules that did not exist when a conviction became final would "seriously undermine[] the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309 (citing *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.")).

This Court instructs that although application of *Teague* is not jurisdictional, it is nevertheless a "threshold question in every habeas case." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Therefore, if the state does not raise a *Teague* defense, a federal court "may, but need not" do so *sua sponte*. *Id.* Federal courts thus raise the nonretroactivity issue regularly. *See, e.g.*, *Webster v. Woodford*, 361 F.3d 522, 526-27 (9th Cir.) (although state waived issue by not presenting it to district court, appellate court exercised discretion to reach issue), *cert. denied sub nom. Webster v. Brown*, 543 U.S. 1007 (2004); *Lewis v. Johnson*, 359 F.3d 646, 654 n.4 (3d Cir. 2004) (exercising discretion to raise *Teague* issue *sua sponte*); *Housel v. Head*, 238 F.3d 1289, 1298 (11th Cir. 2001) (same), *cert. denied*, 534 U.S. 1172 (2002).

4. Abuse of the Writ

A final procedural bar relates to successive habeas petitions. Prior to AEDPA, there was no statutory prohibition against prisoners filing multiple habeas petitions. However, successive petitions were subject to the defense of "abuse of the writ," which allowed for dismissal of second or successive habeas petitions raising grounds not included in the first petition. *See McCleskey*, 499 U.S. at 470; Rule 9(b) of the Rules Governing § 2254 Cases (2004). The abuse of the writ doctrine was designed "to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time . . . and to vindicate the State's interest in the finality of its criminal judgments." *McCleskey*, 499 U.S. at 493. The defense is inapplicable to proceedings governed by AEDPA, as AEDPA prohibits the filing of successive petitions raising new grounds except upon permission from the appropriate circuit court of appeals. 28 U.S.C. § 2244(b)(2),(3).

Those circuit courts that addressed the issue pre-AEDPA held that the abuse of the writ defense could be raised *sua sponte*. *See Femia v. United States*, 47 F.3d 519, 522-23 (2d Cir. 1995); *Sockwell v. Maggio*, 709 F.2d 341, 343-44 (5th Cir. 1983); *Jones v. Estelle*, 692 F.2d 380, 384 n.5 (5th Cir. 1982); *see also Thigpen v. Smith*, 792 F.2d 1507, 1515 (11th Cir. 1986). The Second Circuit explained in *Femia* that dismissal for abuse of the writ is not "within the sole initiative of the prosecution" because abuse of court processes adversely affects the administration of justice to the detriment of the public. 47 F.3d at 522-23. "[W]here a doctrine implicates [nonjurisdictional] values that may transcend the concerns of the parties to an action, it is not inappropriate for the court, on its own motion, to invoke the doctrine." *Id.* (citations and internal quotations omitted).

C. The limitations defense should be treated like other procedural bars to habeas relief.

The question here is whether the federal courts' *sua sponte* authority to raise the defenses of exhaustion, procedural default, nonretroactivity, and formerly, abuse of the writ, similarly applies to the statute of limitations defense. As in *Granberry*, this Court might resolve the question in one of three ways. At one extreme, the position Day urges, the Court might treat the state's failure to raise the defense as an absolute waiver. At the other extreme, the position Day attributes to Respondent, the Court might *require* that a petition be dismissed when the statute of limitations has run. As in *Granberry*, however, neither of these extreme positions is persuasive. The third option, and the one Respondent advocates, is the "intermediate approach" that allows the district court to exercise discretion in each case to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition.

Prior to AEDPA, there was no specific time limitation governing habeas petitions. As a result, state prisoners, particularly those sentenced to death, had incentives to delay filing their habeas petitions. *See, e.g.*, *McCleskey*, 499 U.S. at 491-92; *see also, e.g.*, Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNP) 3239, 3240 (1989) ("litigation of constitutional claims often comes only when prompted by the setting of an execution date."); 142 Cong Rec H3605, H3606 (1996) (statement of Rep. Hyde) (describing then-ubiquitous delays in habeas proceedings in capital cases as "ridiculous"); 142 Cong. Rec. S3454, S3471-72 (1996) (statement of Sen. Specter) (describing delays inherent in the pre-AEDPA habeas statutory scheme).

The purpose of § 2244(d)(1) was to reform and streamline the process, "reduc[ing] the potential for delay on the road to

finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). The limitation period "quite plainly serves the well-recognized interest in the finality of state court judgments," *id.*, and through it, the derivative, equally well-recognized interests in comity and federalism. "The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000), *quoted in Long v. Wilson*, 393 F.3d 390, 402 (3d Cir. 2004).

Because the statute of limitations furthers the same interests as the other traditional habeas defenses, it is appropriate for federal courts to raise the statute of limitations defense *sua sponte* just as it is appropriate to raise *sua sponte* the defenses of exhaustion, procedural default, nonretroactivity and formerly, abuse of the writ. *Acosta*, 221 F.3d at 117 (like other procedural bars to habeas review, statute of limitations implicates interests of federal courts, state courts, and society and therefore it is appropriate for court to raise statute of limitations on own motion). Indeed, Rule 5 expressly treats the limitations defense exactly like other habeas procedural issues. *See* Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts (2005). *See also Long*, 393 F.3d at 403 (there is "no difference between the habeas corpus statute of limitations and other habeas procedural issues"); *Hill v. Braxton*, 277 F.3d 701, 705 (4th Cir. 2002) (citing procedural default case, *Yeatts v. Angelone*, 166 F.3d 255, 261-62 (4th Cir.), *cert. denied*, 526 U.S. 1095 (1991), for proposition that federal habeas courts may raise affirmative defenses not preserved by state because § 2254 proceedings implicate considerations of comity, federalism, and judicial efficiency to degree not present in ordinary civil actions); *Herbst v. Cook*, 260 F.3d 1039, 1042 (9th Cir. 2001) (just as

district court may raise procedural default *sua sponte*, court may also raise statute of limitations *sua sponte* because interests of comity, federalism, and judicial efficiency underlying court's discretion to raise procedural default apply equally to statute of limitations); *Scott v. Collins*, 286 F.3d 923, 934 (6th Cir. 2002) (Stafford, J., dissenting) (AEDPA's statute of limitations advances similar concerns as doctrines of exhaustion and procedural default, so must be treated the same).

A federal habeas petition filed beyond AEDPA's one year statute of limitations presents the possibility a state court judgment which has survived both direct and collateral state court review will be subjected to extensive federal review in direct contravention of Congress's prohibition on federal habeas review of state judgments that have been final for more than one year. This possibility--that ineligible habeas petitions will usurp limited federal resources and may eventually nullify final judgments entered and upheld by the state courts--raises concerns of comity, federalism and finality that extend far beyond the interests of the individual litigants to any particular habeas proceeding. For this reason, the resolution of untimely habeas petitions cannot be left solely in the hands of the litigants. *See United States v. Bendolph*, 409 F.3d 155, 166 (3d Cir. 2005) (en banc) (expressing doubt that "Congress intended to relegate the efficacy of its reforms to the vagaries of a prosecutor's decisions or mistakes"), *petition for cert. filed*, (U.S. June 24, 2005) (No. 05-3); *Hill v. Braxton*, 277 F.3d 701, 705 (4th Cir. 2002) (because § 2254 actions implicate comity, federalism, and judicial efficiency to degree not present in ordinary civil actions, these interests "eclipse the immediate concerns of the parties" and provide courts discretionary authority to raise affirmative defenses not preserved by state).

Day argues that unlike exhaustion and procedural default, the statute of limitations does not implicate comity and federalism. (Pet. Brief 40-41). To the contrary, this Court's precedent

establishes that federal/state relations are implicated by *any* federal collateral attack on a state court criminal judgment, whether or not such attack directly implicates exhaustion or procedural default. The Court explained this well in *McCleskey*, holding that procedural default and abuse of the writ "implicate nearly identical concerns flowing from the significant costs of federal habeas review." 499 U.S. at 490-91. Although the Court acknowledged that comity and federalism—"respect for the integrity employed by a coordinate jurisdiction within the federal system"—are not implicated directly when a petitioner fails to raise a claim in the first round of federal review, it found both the procedural default and abuse of the writ doctrines are "designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time . . . ." *Id.* at 493; *see also Willams v. Taylor*, 529 U.S. 420, 436 (2000) (Court is careful to limit scope of federal intrusion into state criminal adjudications in order to maintain delicate balance between the States and federal courts); *Engle*, 456 U.S. at 128, 134 (explaining that federal intrusions into state criminal trials frustrate states' sovereign power and noting federal habeas challenges to state convictions implicate special comity concerns). Although comity and federalism may be at their zenith when habeas petitioners have failed to exhaust their constitutional claims in state court, this does not negate the significance of these interests in the context of other habeas defenses.

Further, the potential bars to habeas relief are not solely based on comity; they are also grounded in the closely related and equally important goal of protecting the finality of judgments. *See McCleskey*, 499 U.S. at 493 (doctrines of procedural default and abuse of writ also seek to vindicate State's interest in the finality of its criminal judgments); *Teague*, 489 U.S. at 309 (application of constitutional rules announced after conviction became final seriously undermines principle of

finality which is essential to operation of criminal justice system). Like procedural default, abuse of the writ, and nonretroactivity, the one-year statute of limitations for habeas petitions serves "the well recognized interest" in the finality of judgments. *Duncan*, 533 U.S. at 179.

The fact that habeas petitions were not subject to a statute of limitations before AEDPA does not render inapplicable the body of case law relating to pre-AEDPA defenses. Nothing in AEDPA indicates Congress intended to eliminate the federal courts' well-established discretion to raise defenses not raised by the government when doing so advances the interests of comity, federalism, and finality. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962) (rejecting assertion that civil rule impliedly abrogated courts' inherent authority to dismiss cases *sua sponte* for lack of prosecution because "[i]t would require a much clearer expression of purpose than [the rule] provides us to assume that it was intended to abrogate so well-acknowledged a proposition"). Furthermore, AEDPA restricts the habeas courts' discretion to *grant* relief; it does not eliminate the habeas courts' pre-AEDPA discretion to *deny* relief. *Cf. Horn v. Banks*, 536 U.S. 266, 272 (2002) ("[w]hile it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review . . . none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard"). *See also Bendolph*, 409 F.3d at 155 ("no Congressional intent [in AEDPA] to hamstring the courts in carrying out its reforms"). Thus, the long-recognized authority to raise potential habeas bars *sua sponte* remains intact following AEDPA's enactment, and the effect of AEDPA is merely to add the statute of limitations to the list of defenses federal courts may raise on their own motion when doing so advances the interests underlying AEDPA.

Day relies on *Scott*, 286 F.3d 923, for the proposition that Rule 4 grants a district court authority to raise the limitations

defense *sua sponte* and that authority then expires once the court orders the respondent to file an answer. (Pet. Brief 29). However, Rule 4 is not a grant of authority, but rather a recognition of the district court's well established inherent authority to raise defenses *sua sponte*. The plain language of Rule 4 is devoid of any reference to an elimination of the district court's recognized inherent authority. The text of the rule provides no support for Day's argument that this inherent authority "expires" when the court orders the State to answer. Such an abrogation of the courts' inherent authority must be express, and cannot be accomplished by "negative implication." *See Link*, 370 U.S. at 630.

Day also fails to comprehend the purpose of Rule 4 is to transform the court's recognized authority to deny relief, during the "preliminary review" or pre-answer period, from discretionary to mandatory. *See* Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (2005) (judge "must" dismiss the petition if it plainly appears from petition that petitioner is not entitled to relief); *see also id.*, Notes of Advisory Committee on Rules (it is duty of court to "screen out frivolous applications" and eliminate respondent's burden of filing unnecessary answer). The appropriate negative implication to be drawn from Rule 4 is that once preliminary review is complete and the respondent has been ordered to answer, the court no longer "must" dismiss the petition if it appears the petitioner is not entitled to relief. This reading of Rule 4 is entirely consistent with this Court's holdings that federal courts are not required to raise potential affirmative defenses to habeas actions that the State has failed to raise properly. *See Granberry*, 481 U.S. at 133 (court is not required to dismiss for nonexhaustion notwithstanding State's failure to raise it); *Caspari*, 510 U.S. at 389 (court may, but need not, decline to apply nonretroactivity defense if State does not argue it); *Trest*, 522 U.S. at 89 (court is not required to raise issue of procedural default *sua sponte*). If Day were correct that Rule 4

circumscribes the federal courts' discretion to raise defenses *sua sponte* after the State answers the petition, this interpretation of the rule would effectively overrule the Court's holdings in *Granberry* and *Caspari* that a court may consider the defenses of exhaustion and nonretroactivity even if not properly raised in the respondent's answer.

Nor is a habeas court's inherent authority to consider waived affirmative defenses *sua sponte* diminished by 28 U.S.C. § 2254(b)(3) or Rule 5. Section 2254(b)(3), which requires any waiver of the nonexhaustion defense to be express, merely specifies the circumstances in which a court *may* deem the nonexhaustion defense waived; it does not *require* a court to deem a habeas defense waived in any set of circumstances. At most, this subsection can be read as *allowing* implied waiver of defenses other than nonexhaustion. The purpose of the requirement in Rule 5 that certain defenses, including the statute of limitations, be raised in the answer is designed to relieve the petitioner of the burden of overcoming these defenses in the initial petition. *See Femia*, 47 F.3d at 523. Furthermore, the rule does not address what a court may or must do if a State fails to comply with this rule. Section 2254(b)(3) and Rule 5 must be construed consistent with the general principles underlying habeas corpus jurisprudence. *Calderon*, 523 U.S. at 554. Nothing in these provisions eliminates the habeas courts' discretion to decline to apply waiver of a defense, express *or* implied, when the interests of comity, federalism, and finality are served by doing so.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY RAISING THE LIMITATIONS DEFENSE

A. Respondent's waiver, inadvertent or otherwise, did not deprive the district court of inherent authority.

A State's waiver of the AEDPA limitations defense does not abolish the court's inherent authority to dismiss an untimely petition on this ground. The analysis "turns not on waiver, but rather on whether courts have the inherent power to protect themselves from habeas abuse, post-answer, consistent with Congress'[s] intent, and whether, where a court exercises that power, the habeas movant is prejudiced." *Bendolph*, 409 F.3d at 168; *see also Hardiman*, 971 F.2d at 504 (fact that unraised defense may be waived does not mean court cannot raise defense *sua sponte* when issues of comity and judicial efficiency indicate court should not reach merits of habeas claim). Thus contrary to Day's suggestion, the doctrine of waiver does not operate in every case to prohibit habeas courts from raising defenses not raised by the State.

A State's waiver of the limitations defense in a § 2254 case, inadvertent or otherwise, is a factor for the federal court to consider in exercising its discretion to *sua sponte* notice and dismiss an untimely petition. *Yeatts*, 166 F.3d at 262 (court should consider whether state's failure to raise procedural default defense was intentional or inadvertent, and where intentional, court should be circumspect in addressing issue); *see also Magouirk*, 144 F.3d at 359 (where state's waiver is result of purposeful or deliberate decision to forego defense, court should typically presume waiver to be valid). The State's conduct should inform, but not invariably control, the court's discretion. Indeed, it may be an abuse of discretion for a district court to dismiss a habeas petition *sua sponte* based on a defense the respondent has intentionally waived. *See Henderson v. Thieret*,

859 F.2d 492, 498 (7th Cir. 1988) (reversing district court's dismissal of habeas petition on procedural default grounds because dismissal overrode assistant attorney general's statement that state did not wish to pursue procedural default defense), *cert. denied*, 490 U.S. 1009 (1989). This determination is best made on a case-by-case basis.

Here, the district court's exercise of discretion to raise the limitations defense was particularly appropriate because the applicability of the defense was apparent from the entirety of Respondent's answer. The answer does incorrectly concede "the petition is timely" *because it was "filed after 352 days of untolled time."* J.A. 24 (emphasis added). However, the documents referenced in and attached to the answer establish the petition was filed after 388 days of untolled time—after AEDPA's one-year statute of limitations expired. The magistrate judge used these documents to calculate *sua sponte* the number of untolled days, and, upon arriving at a different number than Respondent, issued a show cause order (J.A. 26-30)—implicitly finding erroneous Respondent's position that the petition was timely. The Eleventh Circuit described Respondent's concession of timeliness under these circumstances as "patently erroneous" and found such concession indistinguishable from a failure to plead the defense altogether. *Day*, 391 F.3d at 1194.[4]

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[4] A concession that is patently erroneous is not a waiver merely because it is explicit. A "waiver" requires the intentional relinquishment of a known right. *E.g.*, *United States v. Olano*, 507 U.S. 725, 733 (1993) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *Bendolph*, 409 F.3d at 167. Other courts have held a mistaken concession is not a waiver. *Washington v. James*, 996 F.2d 1442, 1448 (2d Cir. 1993) (government's erroneous concession of procedural defense constitutes "merely an innocent error [and] there is no analytic or policy reason to treat it any differently than a failure to raise the defense at all"), *cert. denied*, 510 U.S. 1078 (1994); *Strader v. Allsbrook*, 656 F. 2d 67, 68 (4th Cir. 1981) (state did not waive exhaustion requirement notwithstanding erroneous concession that petitioner "had exhausted

Where, as here, the applicability of the defense is clear from the face of the record, it is not an abuse of discretion for a federal court to exercise its *sua sponte* authority to raise a procedural bar to habeas. *Ortiz v. Dubois*, 19 F.3d 708, 715 (1st Cir. 1994) (dismissing claim on procedural default grounds notwithstanding state's failure to properly preserve defense because default was clear on face of record and would be needless expenditure of scarce judicial resources to address merits), *cert. denied*, 513 U.S. 1085 (1995).

B. Day had notice and an opportunity to be heard.

When a court exercises its discretion to raise the statute of limitations defense *sua sponte*, justice requires the court to give the parties prior notice and an opportunity to respond. *Hill*, 277 F.3d at 707; *Acosta*, 221 F.3d at 124. This requirement serves the specific interests of the parties in the adversarial process as well as the broader public concerns implicated in habeas proceedings. *McMillan v. Jarvis*, 332 F.3d 244, 249 (4th Cir. 2003). Here, Day was given notice the court viewed his petition as untimely and was given twenty days to show why the petition should not be dismissed on this basis. (J.A. 26-30). Day timely responded. (J.A. 31-32). Therefore, Day received adequate notice and an opportunity to be heard before his untimely petition was dismissed.

In addition to providing the petitioner an opportunity to explain why the petition should not be dismissed, the notice requirement also provides the government the opportunity to inform the court if it affirmatively desires to waive the defense.

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his State court remedies . . . and [was] entitled to adjudication of (his) contentions on the merits"); *Davis v. Campbell*, 608 F.2d 317, 320 (8th Cir. 1979) ("erroneous pleading by the state [is] . . . an express waiver of the exhaustion requirement").

Here, the State did not respond to the show cause order because its concession of timeliness was based on an erroneous calculation and it agreed the petition should be dismissed as untimely. In another case, however, the State might respond to the show cause order by informing the court that it desires to waive the defense. Any such affirmative waiver would be a factor to be considered in evaluating whether a dismissal on a ground affirmatively waived by the State is a proper exercise of the court's discretion. *Henderson*, 859 F.2d at 498; *Yeatts*, 166 F.3d at 262.

C. Day is not prejudiced by the dismissal.

Where, as here, the court raises the defense after the government has filed an answer, the court should also consider whether the petitioner is prejudiced by the *sua sponte* raising of a habeas defense. *Bendolph*, 409 F.3d at 168. The prejudice analysis examines, among other factors, the length of delay in raising the defense, the reason for the delay, and the actual prejudice suffered by the petitioner as a result of the delay. *See id.* at 168-69; *Long*, 393 F.3d at 399-401.[5]

In this case, the elapsed time between the Respondent's answer and the magistrate judge's show cause order first raising the statute of limitations was approximately nine months. (J.A. 5, 6). During this time, the parties were simply awaiting a ruling from the court. The parties did not engage in any additional briefing, did not engage in discovery, and did not conduct an evidentiary hearing. Day did not incur additional expense during this period. Nothing in the record suggests, nor does Day assert, that the Respondent withheld the defense for an improper

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[5] These factors are similar to those courts consider in deciding whether to allow amendment of a pleading pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

purpose. These record facts indicate no prejudice to Day as a result of the court raising the statute of limitations defense *sua sponte*. *See Long*, 393 F.3d at 399 (petitioner not prejudiced where government mistakenly failed to raise statute of limitations defense in answer and 14-month delay between answer and court's raising of defense was not attributable to government); *Bendolph*, 409 F.3d at 168-69 (two-year delay did not constitute prejudice where government did not act in bad faith, petitioner had not engaged in discovery and suffered no loss or diminution in ability to prepare case). The only purported claim of prejudice Day identifies is the time and expense spent briefing the merits and the thwarted expectation of receiving a decision on the merits. (Pet. Brief 18). This claim is insufficient, by itself, to constitute prejudice. *See Long*, 393 F.3d at 399 (frustrated expectation of not having untimely habeas petition heard on merits does not establish prejudice). Because Day was not prejudiced when the district court raised the statute of limitations *sua sponte*, the court did not abuse its discretion by doing so.

Although Day was not prejudiced, he argues that a district court can never raise the statute of limitations defense *sua sponte* because a State might "strategically hold[] a limitations defense in reserve" for use on appeal while seeking a favorable ruling on the merits. (Pet. Brief 14, 38). Indeed, this Court identified this possibility in *Granberry*, citing it as a reason for declining to adopt an "inflexible" rule that would always treat nonexhaustion as a bar to consideration of the merits of a claim. 481 U.S. at 131-32. However, the Court also declined to adopt the petitioner's argument in that case—that the court must regard a State's omission of the nonexhaustion defense as an absolute waiver. *Id.* at 131, 133. Instead, the Court adopted a middle course that allows courts to examine the individual circumstances of each case to determine whether the interests of comity and federalism would be better served by invoking the exhaustion issue or addressing the merits. *Id.* at 133, 134.

So too here, hypothetical misconduct by the State, undisputedly absent in the present case, should not serve as the basis for adopting a blanket prohibition on habeas courts raising a statute of limitations defense *sua sponte*. Instead, courts should be allowed to determine whether it is appropriate to invoke the statute of limitations defense in an individual case. If a State intentionally withholds the defense in order to pursue a favorable result on the merits, this conduct would likely constitute bad faith by the State and would strongly suggest prejudice to the petitioner. *Bendolph*, 409 F.3d at 169 (identifying bad faith by government as an element of prejudice to petitioner). Even if the State's omission of the defense is not intentional, a court's *sua sponte* invocation of the defense late in the proceedings might not serve the interest of judicial economy. *See Esslinger*, 44 F.3d at 1528 n.45 (where district court raised procedural default bar after the evidentiary hearing on the merits, court saved neither time nor resources). Day's concerns about hypothetical scenarios not present in this case are fully addressed by allowing a court to determine whether, in an individual case, *sua sponte* invocation of the statute of limitations causes prejudice to the petitioner and advances the interests of comity, federalism, finality, and judicial economy.

Also contrary to Day's argument, a district court's proper exercise of discretion in raising the limitations defense *sua sponte* does not somehow transform the court into an advocate for one party to the prejudicial detriment of the other. Rather, in so doing the court is simply engaging in effective case management consistent with the letter of AEDPA, the spirit of AEDPA's avowed congressional purpose, and this Court's habeas jurisprudence.

Finally, the simple fact remains Day was not prejudiced because the petition was untimely. Respondent's erroneous concession of timeliness was based on a patently incorrect computation. *See Day*, 391 F.3d at 1194. Unfortunately,

limitations calculations in habeas proceedings are prone to these types of errors. *See Bendolph*, 409 F.3d at 167 ("[H]abeas cases present sometimes difficult questions of time computation .... all too easily, habeas respondents and courts may err in their calculation.") (internal quotations and citations omitted). This propensity for error supports the need for district court discretion. The ultimate effectuation of AEDPA's purposes and the concomitant societal interests cannot and must not rest solely on the shoulders of an individual government attorney's ability to calculate correctly the limitations period in a given case. *Bendolph*, 409 F.3d at 166. Congress did not intend AEDPA to operate as a "gotcha" system of justice where application of essential guidelines can turn on one defective link in the government chain. Providing the court with the discretion advocated herein thus protects both the overriding societal interests and ensures the petitioner will not only be heard but also will not suffer any prejudice by an untoward application of the limitations bar. Nothing in this Court's habeas jurisprudence compels a different result.

D. Day's petition was untimely.

1. ***The issue of the habeas petition's timeliness is not fairly included within the certiorari petition.***

Day urges this Court to find that that his habeas petition was timely in any event because, he asserts, the one-year statute of limitations was tolled during the period he could have but did not seek this Court's review of the denial of his motion for post-conviction relief. (Pet. Brief 45-49). This issue is not properly before the Court. Indeed were this Court to find the petition was timely, this finding would obviate the need to address the very issues on which the Court granted certiorari. If the district court dismissed a timely habeas petition as untimely, this fact alone would warrant reversal.

The Court grants certiorari with the expectation of being able to decide the merits of the issue. *See Schiro v. Farley*, 510 U.S. 222, 229 (1994) (declining to address alternative ground for affirming judgment because "the propriety of reaching the merits of a dispute is an important consideration in deciding whether or not to grant certiorari"). "Only the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court." Supreme Court Rule 14.1(a). The Court has adhered consistently to this rule. *See, e.g.*, *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 563 n.9 (1999); *Lambrix v. Singletary*, 520 U.S. 518, 527 n.1 (1997); *Hagen v. Utah*, 510 U.S. 399, 409-10 (1994); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (per curiam); *Yee v. Escondido*, 503 U.S. 519, 537 (1992). This Court's near-uniform practice is to consider only the precise questions presented in a petition for certiorari along with any "subsidiary question[s] fairly included therein." Supreme Court Rule 14.1(a); *City of Sherrill v. Indian Nation*, 125 S. Ct. 1478, 1490 n.8 (2005); *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457 (1995) ("[W]e will entertain issues withheld until merits briefing only in the most exceptional cases.") (internal quotation omitted). Accordingly, the Court has repeatedly refused to entertain questions following the grant of certiorari that, while related to the questions presented, are analytically and factually distinct. *See, e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha*, 510 U.S. at 32; *Yee*, 503 U.S. at 537.

In this case, the Court cannot address whether the habeas petition was timely without departing from Rule 14.1(a) and the Court's consistent past practice. The questions presented in the petition for certiorari, and the text of the petition itself,[6] address

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[6] The petition mentions the State's concession of timeliness was not erroneous, but does so only to cast doubt on the Eleventh Circuit's characterization of the State's concession as "patently erroneous." Petition for Cert. 19-20.

(1) whether the State waived the limitations defense and (2) whether Habeas Rule 4 deprives the district court of the power to *sua sponte* dismiss a habeas petition on the basis of a ground not raised in the answer. The antecedent issue of whether the habeas petition was timely—and therefore whether the State's concession of timeliness was erroneous—is factually and analytically distinct from these questions. Factually, the events relevant to the petition's timeliness pertain to Day's direct appeal and state court motions for collateral relief, while the events relevant to the questions presented pertain to the proceedings following Day's federal habeas petition. Legally, the question of whether the petition was timely would turn solely upon the Court's construction of 28 U.S.C. § 2244(d)(2), a statute otherwise irrelevant to the questions presented. Additionally, the Court should decline to review the timeliness issue because it was neither briefed to nor decided by the Eleventh Circuit. *E.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 214, 239 (1990) (declining to consider issues not raised or reached below); *Federal Trade Comm'n v. Grolier Inc.*, 462 U.S. 19, 22 n.6 (1983) (same).

2. *State post-conviction proceedings are no longer "pending" after they have concluded.*

If this Court addresses Day's argument regarding the petition's timeliness, it should reject the argument. Section 2244 provides that AEDPA's one-year period of limitation is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). The purpose of this provision is to "promote[] the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief *while state remedies are being pursued*." *Duncan*, 533 U.S. at 179 (emphasis added). By its clear terms, the

provision "accord[s] tolling effect only to properly filed applications for State [as opposed to Federal] post-conviction or other collateral review." *Id.* at 180 (internal quotation omitted). A petition to this Court is not an "application for State post-conviction or other [State] collateral review." *See id.* at 173 ("We find no likely explanation for Congress' omission of the word 'Federal' in § 2244(d)(2) other than that Congress did not intend properly filed applications for federal review to toll the limitation period."); *see also, e.g., Crawley v. Catoe*, 257 F.3d 395, 400 (4th Cir. 2001), *cert. denied*, 534 U.S. 1080 (2002); *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999), *cert. denied*, 528 U.S. 1084 (2000). Therefore, Day's theory that his habeas petition was timely can only be correct if such an application remains "pending" after it becomes final, during the period that the prisoner could, but doesn't, petition for certiorari. The Court should conclude it does not.

In *Carey v. Saffold*, 536 U.S. 214 (2002), the Court considered whether an application for State post-conviction relief remained "pending" within the meaning of § 2244(d)(2) during discrete intervals in a State's post-conviction process in which a criminal defendant's application for relief was momentarily not under court consideration. *Id.* at 217. Answering the question in the affirmative, the Court held that the application remains "pending" for § 2244(d)(2) purposes "until the application has achieved final resolution through the State's post-conviction procedures." *Id.* at 220. The Court explained in *Carey* that the ordinary meaning of "pending" is "in continuance" or "not yet decided" when used as an adjective, and "through the period of continuance . . . of" or "until the . . . completion of" when used as a preposition. *Id.* at 219-220. Because § 2244(d)(2) refers only to "application[s] for State post-conviction or other [State] collateral review," *see Duncan*, 533 U.S. at 180, the ordinary meaning of § 2244(d)(2) provides that the limitations period described in § 2244(d)(1) is tolled only "through the period of continuance . . . of [the State proceedings]," "until the . . .

completion of [the State proceedings], or only so long as the State proceedings are "in continuance" or "not yet decided."

This Court should reaffirm the holding of *Carey* in this context. Section 2244(d)(2) fully comports with AEDPA's comity interest, without unduly impacting AEDPA's finality interest, only if the tolling period described in the statute is limited to the time necessary for a state prisoner's pursuit of state remedies. "By tolling the limitation period for the pursuit of state remedies . . . § 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts." *Duncan*, 533 U.S. at 180. "At the same time, the provision limits the harm to the interest in finality by according tolling effect only to 'properly filed applications for State post-conviction or other collateral review.'" *Id.* at 179-80.

A state prisoner's decision to petition this Court for a writ of certiorari from a State court's denial of "state remedies" implicates different concerns. In many respects, it implicates the same concerns as a subsequent habeas petition because it represents an attack in federal court on the integrity of a state court judgment which, until resolved, defeats the finality of the state court judgment. Accordingly, Day's construction of § 2244(d)(2) contravenes the purposes of AEDPA and § 2244(d)(2) to the extent it extends the tolling period beyond the conclusion of State court proceedings.

Day's construction of § 2244(d)(2), while championed by the Sixth Circuit in *Abela v. Martin*, 348 F.3d 164, 172-73 (6th Cir. 2003) (en banc) (Martin, J., writing for majority in 6-5 decision), *cert. denied*, 541 U.S. 1070 (2004), has been explicitly repudiated by each of the ten other circuits to have considered the issue. *See David v. Hall*, 318 F.3d 343, 345 (1st Cir.), *cert. denied*, 540 U.S. 815 (2003); *White v. Klitzkie*, 281 F.3d 920, 924 (9th Cir. 2002); *Smaldone v. Senkowski*, 273 F.3d 133, 137-38 (2d Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002); *Crawley*

v. Catoe, 257 F.3d 395, 401 (4th Cir. 2001), *cert. denied*, 534 U.S. 1080 (2002); *Stokes v. District Att'y*, 247 F.3d 539, 542 (3d Cir.), *cert. denied*, 534 U.S. 959 (2001); *Snow v. Ault*, 238 F.3d 1033, 1035-36 (8th Cir.), *cert. denied*, 532 U.S. 998 (2001); *Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000), *cert. denied*, 532 U.S. 950 (2001); *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *cert. denied*, 531 U.S. 1166 (2001); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999), *cert. denied*, 592 U.S. 1099 (2000); *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999), *cert. denied*, 528 U.S. 1084 (2000).

The clear majority view is that a petition for a writ of certiorari to the United States Supreme Court is simply not an application for state review. Section 2244(d)(2) only tolls time when "a *state* prisoner is attempting, *through proper use of state court procedures, to exhaust state court remedies*," and that time spent pursuing *a federal writ* is not included in the tolling period described in § 2244(d)(2). *E.g.*, *White*, 281 F.3d at 924; *see also Crawley*, 257 F.3d at 400; *Rhine*, 182 F.3d at 1155-56. This view is supported by the text of AEDPA and the policies of comity, federalism and finality that govern habeas proceedings. Accordingly, if the Court decides to address this issue, it should reject Day's argument and adopt the clear majority view of the circuits.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the decision of the Eleventh Circuit affirming the district court's dismissal of Day's petition for writ of habeas corpus be affirmed.

RESPECTFULLY SUBMITTED,

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